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No. 86-32

IN THE

Supreme Court of the United States

OCTOBER TERM, 1986

ANNE M. GORSUCH, ADMINISTRATOR,
ENVIRONMENTAL PROTECTION AGENCY,
Petitioner,

vs.

SIERRA CLUB AND ENVIRONMENTAL DEFENSE FUND,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

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BRIEF FOR RESPONDENT ENVIRONMENTAL DEFENSE FUND

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QUESTIONS PRESENTED

Section 307(f) of the Clean Air Act authorizes fee awards in litigation under that section "whenever [the court] determines such award is appropriate." The questions presented are:

(1) whether the court of appeals properly interpreted this provision in concluding that its discretion to award fees is not limited to successful or prevailing parties; and

(2) whether, on the facts of this case, the court abused its discretion by basing its fee award on specific findings that the litigation advanced the objectives of the Clean Air Act.

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STATEMENT

This case involves separate awards of attorney fees to the Environmental Defense Fund (EDF) and the Sierra Club under section 307(f) of the Clean Air Act ("the Act"), 42 U.S.C. § 7607(f) (Supp. IV 1980), in litigation involving the validity of regulations[1] issued by the Environmetnal Protection Agency (EPA) under the Act. The court of appeals awarded fees to EDF because its efforts in the litigation had furthered the objectives of the Act in several specific ways. The court found that litigating the questions raised by EDF clarified the law regarding important, novel and complex issues under the Act and that its decision provided guidance to EPA and the executive branch. The court of appeals emphasized EDF's "exemplary" performance in assisting and educating it concerning the questions involved. The court also found that EDF's participation caused EPA to reveal important information which had not previously been made available to the public or the parties. To evaluate these findings, it is necessary to consider the underlying merits litigation and its background.

The regulations in issue were new source performance standards (NSPS) which established nationally-applicable limitations for emissions of pollutants from new or modified coal-fired electric generating plants. Those regulations are important in several respects. The pollutants regulated by the NSPS are known to cause or contribute to respiratory illnesses and are emitted in millions of tons by coal-fired generating plants each year. The projected costs of complying with the revised NSPS were estimated as tens of billions of dollars. In addition, the rulemaking had important implications for the future development and use of coal resources in the United States and the feasibility of using coal from eastern states, which generally has higher sulfur content.

The comment period for the rulemaking closed on January 15, 1979. After that date, during the final stages of the rulemaking, EPA received written comments and

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[1] 44 Fed. Reg. 33580 (June 11, 1979), 40 C.F.R. Part 60 (1981).

engaged in nine private meetings with representatives of the coal industry, the majority leader of the Senate and other representatives of Congress, and officials of the executive branch, including the President himself. EDF challenged the NSPS primarily on the basis of these "*ex parte*" communications. Two of these meetings were never recorded in the rulemaking docket: a meeting with the President on April 30, 1979, and a meeting with Senate staff on May 1, 1979. EDF learned of these meetings by obtaining the calendar of an EPA official pursuant to the Freedom of Information Act.

In its petition for review of the regulations, EDF challenged the propriety of EPA's actions under the recently enacted procedural requirements of section 307 of the Act and the due process clause of the Fifth Amendment. Thereafter, EDF filed a motion for discovery with respect to the *ex parte* contacts. In response, EPA opposed all discovery on the basis that the court of appeals' review was limited to the administrative record, as defined by the Act, and categorically asserted that all intra-executive branch communications, both written and oral, were excluded from that record.[2] With respect to the other *ex parte* contacts, EPA contended that the summaries of meetings placed in the record were sufficient,[3] although the text of one such summary is only 32 words long (J. App. at 17), and the court characterized another as "not very informative." *Sierra Club I*, 657 F.2d at 389. EPA also acknowledged that it had decided not to reduce all oral interagency communications to writing for the rulemaking record.[4]

On June 16, 1980, the court of appeals ordered EPA to submit affidavits providing information about all but one of the meetings specified in EDF's motion. J. App.

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[2] Respondents' Memorandum in Opposition to Motion for Leave to Obtain Discovery, filed May 1, 1980, *EDF* v. *Costle*, No. 79-1874 (D.C. Cir.), *consolidated with Sierra Club* v. *Costle*, 657 F.2d 298 (D.C. 1982) (hereafter *Sierra Club I*).

[3] *Id.* at 7.

[4] *Id.* at 14-15.

24-25. The court ordered EPA to identify the participants in the meetings and to describe how the meetings came to be held and their approximate length. *Id.* EPA submitted some of the information requested by EDF,[5] whereupon EDF pointed out the lack of documentation concerning certain of the meetings, including the meeting with the President, and renewed its request for information.[6] Before the court ruled on that request, EPA "voluntarily" submitted affidavits providing information concerning the undocumented meetings. J. App. 26-29. The information disclosed as a result of EDF's discovery requests provided the factual basis for the court of appeals' resolution of the issues presented in this case; the affidavits required of EPA are frequently cited in the court's opinion on the merits.[7]

With respect to the propriety of the *ex parte* meetings and EDF's request for further discovery, EPA took the position that communications within the executive branch are generally confidential and that nothing in the Clean Air Act altered that rule. Brief for Respondents at 144-45. EPA repeatedly asserted that such communications were categorically excluded from the record for review, regardless of when they occurred. *Id.* at 145, 147, 173, 179. Accordingly, EPA suggested that all those communications "are not properly before this court."

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[5] In its discovery request, EDF identified two meetings on April 30, 1970, a meeting at 10 A.M. with the President and others, J. App. at 19, and a meeting with White House staff at 2:30 P.M., J. App. 15, 17. The court of appeals ordered EPA to submit affidavits to identify the meetings "by date with reference to the petitioner's motion. . . ." J. App. at 25. EPA submitted information pertaining only to the afternoon meeting, apparently because it "assumed" that EDF was not interested in documentation of the meeting with the President, arguing that EDF's Motion did not refer to it, although EDF's supporting Memorandum did. J. App. at 26-27, 19.

[6] Brief for Petitioner Environmental Defense Fund at 43-48, 76-88.

[7] *E.g.*, *Sierra Club I*, 657 F.2d at 387 n.429, 388 n.439, 388 n.441, 389 nn.443-44, 389 n.446, 390 n.451.

Id. at 146. In its ruling on this aspect of the case, the court of appeals pointed out that the Clean Air Act did not address the question. 657 F.2d at 400. However, the court rejected the agency's broad claim of executive branch confidentiality, inferring that the Act required even oral communications to be docketed, regardless of the time at which they occur, if they are of central relevance to the rulemaking. Based on the affidavits which EPA had been required to submit, the court was able to determine that none of the undocketed meetings met that standard and accordingly the regulations were upheld. The court pointed out, however, that executive branch personnel are not exempt from the requirement that all written materials, including inter-agency communications, received from "any person" during the comment period must be placed in the docket. 657 F.2d at 405 n.519 (construing 42 U.S.C. § 7607(d)(4)(B)(i)). Thus, the court indicated that even inter-agency review documents are made part of the record for judicial review by 42 U.S.C. § 7607(d)(7)(A),[8] contrary to EPA's broad assertion of privilege.

With respect to EDF's request for further discovery, the court ruled that it was unnecessary because EPA had already been required to disclose much, if not all, of the information EDF sought. 657 F.2d at 390 n.450. Similarly, with respect to EDF's motion to supplement the record, the court observed that the documents in question "have already been lodged and examined by us during our review of EDF's procedural claims," and accordingly held that it was unnecessary to supplement the record formally. *Id.*

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[8] This is apparent since the court's observation is made as a counterpoint in a discussion of the Act's failure to include inter-agency review documents, as such, in the judicial review record. *Sierra Club I*, 657 F.2d at 404-05 n.519. Although the court was not explicit, the statute makes clear that inter-agency written materials which are included in the record on the ground that they are written materials received from "any person," 42 U.S.C. § 7607(d)(4)(B)(i), *are* part of the record for judicial review. 42 U.S.C. § 7607(d)(7)(A).

Shortly before the court of appeals issued its opinion on the merits in this case, on February 17, 1981, President Reagan signed Executive Order 12291[9] providing for oversight of agency regulatory actions by the Task Force on Regulatory Relief and the Office of Management and Budget (OMB). Although the Executive Order provides for submission of proposed and final rulemaking documents to OMB and provides for OMB comments thereon, it generally does not address the question whether such communications should be reflected in the agency rulemaking record.[10] Shortly after the court of appeals addressed that issue in its opinion in this case, the Director of the Office of Management and Budget issued a memorandum setting forth guidance concerning the question. J. App. at 30-31. The "Stockman Memorandum," issued on June 11, 1981, was directed to all departments and agencies of the executive branch. It explains how factual materials received from the public or developed within OMB or the Task Force on Regulatory Relief will be handled when they relate to an agency informal rulemaking. Under the procedures announced in the Memorandum, members of the public submitting information to OMB will be reminded that the information should also be submitted to the agency in question and that such agencies should place those materials in the rulemak. g record. In addition, factual materials developed wi in OBM will be docketed in the rulemaking record when submitted to an agency. At its conclusion, the Memorandum points out that the procedures adopted are consistent with "the holding of and policies discussed in *Sierra Club* v. *Costle*. . . ." J. App. at 31. The de-

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[9] 46 Fed. Reg. 13193, 3 C.F.R. § 127 (1982), *reprinted in* 5 U.S.C. § 601 app. at 136-38 (1981).

[10] The only possible exception is a provision requiring agencies to withhold promulgation of final rules until the views of the Director of OMB with respect to the rule have been included, with the agency's response, in the "rulemaking file." *Id.* § 3(f)(2), 3 C.F.R. at 130. However, that provision is inapplicable to rulemakings under judicial or statutory deadline. *Id.* §§ 3(f)(2), 8(a)(2), 3 C.F.R. at 130, 133.

cision in this case is the only legal authority cited in the Memorandum.

Following the court's opinion on the merits of this litigation, EDF and the Sierra Club filed motions seeking awards of attorney fees and costs, relying on section 307(f) of the Clean Air Act. The Justice Department, representing EPA, then engaged in settlement discussions with EDF and the Sierra Club concerning the size of an appropriate award. Although EDF reached a negotiated settlement with counsel for EPA,[11] that settlement dissolved when, in the summer of 1981, the government adopted a new policy of blanket opposition to attorney fee awards to non-prevailing parties. On February 5, 1982, the court ruled, contrary to EPA's contentions, that attorney fees could be awarded to non-prevailing parties and that an award was appropriate in this case. Petition for Writ of Certiorari (hereafter Pet.) at 1a; *Sierra Club* v. *Gorsuch*, 672 F.2d 33 (1982) (hereafter *Sierra Club II*). On July 16, 1982, following unsuccessful settlement negotiations, the court issued its ruling fixing the amount of the fee awards. Pet. at 23a; *Sierra Club* v. *Gorsuch*, 684 F.2d 972 (1982).

SUMMARY OF ARGUMENT

I. The court of appeals had clear authority to grant EDF's fee application in this case even though it upheld the regulations which EDF challenged. Section 307(f) of the Clean Air Act empowers the court to award attorney fees "whenever it [the court] determines that such award is appropriate." 42 U.S.C. § 7607(f) (Supp. IV 1980). The court's discretion to make fee awards is not limited

[11] In the court of appeals, EPA conceded that EDF had reached an agreement with the government which was subsequently rejected by the Assistant Attorney General. Reply to Oppositions of the Sierra Club and the Environmental Defense Fund to the United States' Motions for Leave to File Out of Time and for Enlargement of Time to Respond to Motions for Award of Attorneys Fees at 2, filed as Appendix A to Reply Brief for the United States on the Issue of Attorney's Fees for Losing Parties under 42 U.S.C. 7607 (F) [sic], filed December 7, 1981.

by the outcome of the underlying litigation. Rather the determination of an "appropriate" circumstance is governed by whether the litigation assisted in proper implementation and administration of the Act or otherwise served the public interest. Hence, fee awards are not restricted to "prevailing" or "successful" parties. This interpretation is confirmed by *every* source of authority: (a) the plain meaning of the statutory language, (b) the legislative history and judicial construction of section 307(f), and (c) the legislative history and case law interpretation of similar statutory provisions. The doctrine of sovereign immunity has no bearing on this case, since it has been waived expressly and the congressional intent is clear. By contrast, the government's current position, that the statute limits fee awards to "successful" parties, has no authoritative support whatsoever.

II. The court of appeals did not abuse its discretion by awarding fees to EDF. To find an abuse requires a clear showing that no reasonable person could reach the same result on the given facts. Here the court issued its award after analyzing the record in detail and applying standards consistent with the legislative history of section 307(f). Upon this basis, the court found that EDF had advanced two significant objectives of the Act: prompt resolution of serious questions of statutory interpretation and citizen participation in monitoring administration of the Act. The record supports the court's finding and demonstrates that EDF contributed to the advancement of these statutory objectives in four ways:

(1) It helped resolve important, novel and complex issues of law. EDF's challenge to the propriety of *ex parte* communications resulted in an important development in and clarification of the law with regard to *ex parte* contacts and presidential involvement in the regulatory process. EDF's challenge brought about resolution of several close questions of interpretation for future rulemaking under the Act.

(2) It forced important public disclosures of factual information. Because of EDF's persistent demands for

document production from EPA, the agency was compelled, over vigorous objection, to produce for the court's scrutiny important information which was essential to a full and fair review of the regulations. The production and review of this information was significant because of the subject matter disclosed and the rejection of EPA's broad claim of executive branch confidentiality.

(3) It provided balanced representation of competing interests in the litigation and assisted the court by "exemplary performance." The court found it "absolutely essential" in this case to have articulate spokesmen for environmental as well as industrial interests, especially when dealing with controversial considerations of public policy. Without EDF's substantial contribution "the process of judicial review might have been fatally skewed." Pet. at 18a; 672 F.2d at 41.

(4) Because of the issues EDF raised, the court's decision gave important guidance to EPA and the executive branch. As a direct result of EDF's challenge, the Office of Management and Budget ordered that regulatory reform procedures under Executive Order 12291 be consistent with the holding in this case. The government's position was clearly affected by the efforts of EDF in this litigation.

EDF's efforts clearly both assisted in the proper implementation and administration of the Act and served the public interest. Inasmuch as other courts have granted attorney fees based on similar considerations, there is nothing radical or revolutionary in the court's decision. Moreover, each of these findings is factually supported by the record and directly related to the goals of the Act. Accordingly, the court did not abuse its discretion; the decision to award fees should be affirmed.

III. If this Court determines that the court of appeals applied an incorrect legal standard, the matter should be remanded to the court of appeals with appropriate guidance.

ARGUMENT

I. THE CLEAN AIR ACT CONFERS DISCRETION ON THE COURTS TO MAKE ATTORNEY FEE AWARDS, WITHOUT RESTRICTION TO "PREVAILING" OR "SUCCESSFUL" PARTIES.

In this case, EPA seeks reversal of a discretionary award of attorney fees to respondents Sierra Club and EDF under section 307(f) of the Clean Air Act (the "Act"), 42 U.S.C. § 7607(f) (Supp. IV 1980), which provides, in relevant part:

> "In any judicial proceeding under this section, the court *may* award costs of litigation (including reasonable attorney . . . fees) *whenever it determines that such award is appropriate.*"
>
> 42 U.S.C. § 7607(f) (Supp. IV 1980) (emphasis added).

Section 307(f) is one of numerous attorney fee award provisions enacted by Congress.[12] As this Court noted in *Alyeska Pipeline Service Co.* v. *Wilderness Society*, 421 U.S. 240 (1975),[13] those provisions vary considerably in their terms, and

> "[U]nder this scheme of things, it is apparent that the *circumstances under which attorneys' fees are to be awarded and the range of discretion of the courts in making those awards are matters for Congress to determine.*"
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> 421 U.S. at 262 (footnote omitted, emphasis added).

Most fee award statutes explicitly require a party to "prevail"[14] or to have maintained a "successful ac-

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[12] The provisions are collected in Congressional Research Service, *Awards of Attorneys Fees by Federal Courts and Federal Agencies* (Jan. 28, 1981).

[13] In that case (hereafter cited as *Alyeska*), this Court reversed an award of attorney fees for lack of statutory authorization.

[14] *E.g.*, Civil Rights Attorney's Fees Awards Act of 1976, 42 U.S.C. § 1988; Voting Rights Act of 1965, 42 U.S.C. § 1973 *l* (e); Interstate Commerce Act, 49 U.S.C. § 11708(c); Commodities Futures Trading Commission Act of 1974, 7 U.S.C. §§ 18(f), (g).

tion," [15] in order to recover fees. In a few other statutes, including section 307(f), Congress expanded the "range of discretion . . . in making these awards" to cases where the courts determine fee awards to be "appropriate." [16] While such an exercise of discretion is subject to review for abuse, the statutory standard for awarding fees does not require the fee applicant to have "succeeded" or "prevailed."

A. The Plain Language of Section 307(f) Authorizes an Award of Fees.

The starting point in interpreting a statute is the language of the statute itself. *Diamond* v. *Diehr*, 450 U.S. 175, 182 (1981); *Perrin* v. *United States*, 444 U.S. 37, 42 (1979). Appling this axiom, section 307(f) clearly authorized the court of appeals to make an award of fees in this case. That section unambiguously provides for fee awards "whenever" the court "determines" an award is "appropriate." These words of the statute are to be read according to their ordinary, contemporary, common meaning. *Diamond* v. *Diehr*, 450 U.S. at 182; *Perrin* v. *United States*, 444 U.S. at 42; *United States* v. *Pfitsch*, 256 U.S. 547, 551 (1921); *Pennsylvania Railroad Company* v. *International Coal Mining Company*, 230 U.S. 184, 199 (1913). Moreover, in construing a statute, every word used by Congress should be given effect. *Reiter* v. *Sonotone Corporation*, 442 U.S. 330, 338-39 (1979); 2A Sands, *Sutherland Statutory Construction* § 46.06 (4th ed. 1973).

The relevant dictionary definition of "whenever" is "At whatever time; no matter when . . . ." [17] The definition of "determine" is "To fix conclusively or authoritatively; . . . to decide by authoritative or judicial sentence . . . ." [18] The definition of "appropriate" is "Specially suitable; fit;

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[15] Real Estate Settlement Procedures Act, 12 U.S.C. § 2607(d)(2); Right to Financial Privacy Act, 12 U.S.C. §§ 3417(a)(4), 3418; Jeweller's Hallmark Act, 15 U.S.C. § 298(c).

[16] See note 34, *infra*.

[17] *Webster's New Internatioanl Dictionary*, 2910 (2d ed. 1934).

[18] *Id.* at 711.

proper." [19] Thus, fee awards are authorized, by the terms of section 307(f), at whatever time the court decides that such an award is suitable, proper or fitting. The statute imposes no other prerequisites, although the court's determination must, of course, have a basis in the record and is reviewable for an abuse of discretion.[20]

Nonetheless, EPA contends that section 307(f) contains an implicit restriction which turns on the outcome of the litigation.[21] Although the agency's brief never settles upon a single statement defining the term "appropriate," [22] it does contend that a fee award is not "appropriate" when the applicant is "totally unsuccessful," as it characterizes Sierra Club and EDF to have been in this action. Pet. Brief at 2. In sum, EPA would apparently require a fee applicant to be successful in some sense, irrespective of any finding by the court that an award is "suitable" or in the public interest. Such a restriction is notably absent from the statutory language.

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[19] *Id.* at 133.

[20] Where permissive statutory language is present, fee awards have been recognized as properly within the discretionary domain of the court of first instance. *Alyeska*, 421 U.S. 240, 260-62 (1975); *Copeland* v. *Marshall*, 641 F.2d 880, 901 (D.C. Cir. 1980) (*en banc*); *Carr* v. *Blazer Financial Services, Inc.*, 598 F.2d 1368, 1370 (5th Cir. 1979); *cf. Pete* v. *UMW Welfare & Retirement Fund of 1950*, 517 F.2d 1275, 1289 (D.C. Cir. 1975).

[21] Petitioner's Brief (hereafter "Pet. Brief") at 9, 20-22, 28, 30.

[22] EPA sets out, or at least approves of, seven different definitions of "appropriate": (1) when a party "succeeded in correcting a violation of the Act but did not obtain a final judgment," Pet. Brief at 9; (2) when parties "accomplish a tangible pollution control benefit short of judgment," *id.* at 20; (3) "a party must at least not lose," *id.* at 21; (4) when a party achieves "abatement without final judgment," *id.*; (5) in "litigation that promotes 'proper implementation of the Act,'" *id.* at 25; (6) when parties are "successful plaintiffs or . . . plaintiffs who accomplish something concrete short of judgment," *id.* at 26; and (7) when parties achieve "some measure of success," *id.* at 30. In addition to one, some, or all of these, EPA contends that the applicant must also "contribute to the goals of the Act." *Id.*

B. The Context of Section 307(f) Within the Act Suggests No Restriction of Fee Awards to "Successful" Parties.

Where a particular word or phrase appears in one part of a statute, but has been omitted from another which was contemporaneously enacted, it is reasonable to infer that the omission was intentional. 2A Sands, *Sutherland Statutory Construction* § 46.05 (4th ed. 1973). A comparison of section 307(f) with section 322 of the Act, 42 U.S.C. § 7622, suggests that Congress deliberately omitted any "success" limitation on the award of attorney fees under section 307(f). Section 322 provides a mechanism to prevent retaliation against employees who testify in or commence proceedings under the Act or who assist in any action to carry out the purposes of the Act. Any employee who believes he has been the subject of retaliation may file a complaint with the Secretary of Labor, who is authorized to investigate the charges and order appropriate relief. Section 322(b)(2)(B) provides that the Secretary "shall" award attorney fees to the complaining employee if a remedial order is issued, plainly requiring the employee to have obtained a favorable order in order to be eligible for a fee award. By contrast, however, if such an employee later seeks judicial enforcement of the order, the court is authorized to award fees "whenever the court determines such award is appropriate." 42 U.S.C. § 7622(e)(2). Thus Congress chose to limit the discretion of the Secretary of Labor to award fees to successful complainants only, but omitted any such limitation from judicial enforcement proceedings.

Both these fee award provisions were enacted at the same time as section 307(f), the provision involved in this case.[23] The contemporaneous enactment of these provisions strongly suggests that Congress deliberately

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[23] Section 304(d), 42 U.S.C. § 7604(d), is also an attorney fee provision and also contains an "appropriate" standard. It was not, however, enacted contemporaneously with section 307. See discussion *infra* at 18-22.

omitted any "successful" party limitation from section 307(f). It is well established that a statute should not be interpreted so as to insert a term which Congress has deliberately omitted, especially where that term has been included in other provisions of the same statute. *Fedorenko* v. *United States*, 449 U.S. 490, 513, 513-14 n.35 (1981); *Federal Trade Commission* v. *Simplicity Pattern Company*, 360 U.S. 55, 66-67 (1959); *Carey* v. *Donohue*, 240 U.S. 430, 436-37 (1916); *General Electric Co.* v. *Southern Construction Co.*, 383 F.2d 135, 138 n.4 (5th Cir. 1967), *cert. denied*, 390 U.S. 955 (1968). Accordingly, section 307(f) should not be interpreted to impose a "successful party" limitation.

C. The Legislative History Confirms the Absence of a "Successful" Party Limitation.

The 1977 legislative history[24] of section 307(f) indicates clearly that Congress intended to authorize the

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[24] To bolster its legislative history argument, the agency resorts to fee award proposals considered by other congresses, with radically different structures. See Pet. Brief at 35-36 and 35 n.23. Given the wide variety in congressionally enacted fee award statutes, EPA's brief does nothing more than establish that these provisions "differ considerably among themselves." *Alyeska*, 421 U.S. at 261.

EPA refers to the legislative history of the Equal Access to Justice Act in support of its position that awards of attorney fees to a non-prevailing party is so unusual as to be improper. Pet. Brief 14 n.6. EPA refers to a provision in an early version of that Act which allowed for awards of attorney fees to non-prevailing parties if the court found the award to be "in the interest of justice." It then stated:

> "This provision was deemed a 'radical' and 'unacceptable' departure from current law . . . and was eliminated from the bill prior to hearing."
>
> Pet. Brief at 14 n.6.

What EPA fails to state is that the party who "deemed" the provision unacceptable was not a member of Congress, but a representative of the Department of Justice, which represents EPA in this litigation. The comment was made by Paul Nejelski, Deputy Assistant Attorney General, Office for Improvements in the Administration of Justice. Examination of the full passage indicates that the witness stated that the proposal would constitute "a radical, and,

courts to make discretionary fee awards without a restriction based on the outcome of the litigation. In 1976 and 1977, Congress consciously selected the current statutory provision over a proposed alternative which would have restricted fee awards to parties who "prevailed" or "prevailed in part." Significantly, by 1977 those terms had been so generously construed that adoption of the limiting terms would have provided essentially the same standard for which the government now contends. When Congress rejected those proposed limitations it rejected the position now advanced by EPA.

In 1976 the Senate passed a bill, S.3219, which contained the following provision:

> "In any judicial proceeding under this Act in which the United States or an officer or employee thereof is a party (other than as an intervenor), any party other than the United States which *prevails* in such action shall recover from the United States the reasonable costs for such party's participation in such proceeding, including reasonable attorney's fees, expert witness fees, and the costs of any studies, analyses, tests, or engineering reports that the court finds were necesasry to litigate such action. In any case

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in our view, unacceptable departure from the current law." Even more serious is the Justice Department's omission from its brief of the following statement from the testimony:

> "While *we are not prepared to say that awarding legal fees to a losing party can never be justified*, we think that such a provision amounts to an invitation to spurious litigation, particularly in view of the breadth of the phrase 'in the interest of justice.'"
>
> *Equal Access to Courts: Hearings on S.2354 Before the Senate Subcommittee on Improvements in Judicial Machinery of the Committee on the Judiciary*, 95th Cong., 2d Sess. 31 (1978) (emphasis added).

Not only has the Department of Justice cited its own view of the disputed issue as authoritative, it has seriously distorted even its own views, since it conceded that "awarding legal fees to a losing party" might be justified in some cases. *Id.*

> in which such party *prevails in part*, the court shall have discretion to award such reasonable costs." [25]

The House, however, passed a bill with a provision identical to the version of section 307(f) finally enacted, and in the Conference Committee the House version prevailed. H.R. 10498, 94th Cong., 2d Sess. § 311(c) (1976), *reprinted in* Legislative History at 6071; H.R. Rep. No. 94-1742, 94th Cong., 2d Sess. 115-16 (1976), *reprinted in* Legislative History at 4400-01.

Because the 1976 Conference Committee amendments did not pass during the 94th Congress, various bills were reintroduced the following January, including H.R. 6161 in the House and two bills introduced in the Senate, S. 252 and S. 253. H.R. 6161 and S. 253 both provided that the court "may" award attorney fees "whenever it determines that such award is appropriate." H.R. 6161, 95th Cong., 1st Sess. § 305(b) (1977); S. 253, 95th Cong., 1st Sess. § 36 (1977), *reprinted in* Legislative History at 3817. S. 252 contained a fee award provision identical to the version rejected by the Conference Committee in the preceding Congress. S. 252, 95th Cong., 1st Sess. § 36 (1977), *reprinted in* Legislative History at 3644. The Committee which considered S. 252 reported it to the Senate floor, where it was eventually adopted. Before adoption, however, it had been amended so that its attorney fee provision was made identical to the current version of section 307(f). 123 Cong. Rec. 18514, 18516, 18528 (1977). Thus, once again Congress rejected the proposed limitation on fee awards under section 307(f).

The provision rejected by Congress would have limited awards to prevailing parties and parties who "prevail in part." The rejection of the narrower provision evinced Congress' intent to confer discretion to award fees even where the potential recipient did not "prevail in part."

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[25] S.3219, 94th Cong., 2d Sess. § 35 (1976), *reprinted in A Legislative History of the Clean Air Act Amendments of 1977*, Ser. No. 95-16, 95th Cong., 2d Sess. at 4689 (1978) (hereafter "Legislative History") (emphasis added).

The significance of that choice is emphasized by the broad interpretation which the phrase "prevailing party" had, by 1977, received in the courts. EPA concedes that it had been construed to include parties who "prevail" by settlement rather than by litigated judgment, Pet. Brief at 20-21 & n.13, and that interpretation was confirmed by this Court in *Maher* v. *Gagne*, 448 U.S. 122, 129 (1980). Even before 1977, several courts had awarded fees to parties who received little or none of the relief claimed, even under "prevailing party" standards. *See, e.g., Reed* v. *Arlington Hotel Co.*, 476 F.2d 721 (8th Cir.), *cert. denied*, 414 U.S. 854 (1973); *Parham* v. *Southwestern Bell Telephone Co.*, 433 F.2d 421 (8th Cir. 1970); *Richards* v. *Griffith Rubber Mills*, 300 F. Supp. 338 (D. Ore. 1969). *See also* Dawson, *Lawyers and Involuntary Clients in Public Interest Litigation*, 88 Harv. L. Rev. 849, 891-93 (1975). It is unnecessary in the present case to resolve whether those cases properly interpreted the term "prevailing party" because that standard is absent from the Clean Air Act and its interpretation is not involved in this case. The cases cited are indicative, however, of the broad interpretation given to the standard. Hence, Congress' deliberate rejection of any form of "prevailing party" limitation for section 307(f), despite the expansive interpretation already given that term, indicates its intent to confer broad authority on the courts to make discretionary fee awards.

Two House Reports which accompanied the 1977 Amendments support the court of appeals' interpretation of section 307(f) and undermine EPA's position. Both state:

> "In the case of the section 307 judicial review litigation, the purposes of the authority to award fees are not only to discourage frivolous litigation, but also to encourage litigation which will assure proper implementation and administration of the act *or otherwise serve the public interest.* The committee did not intend that the court's discretion to award fees under this provision should be restricted to cases in which the party seeking fees was the 'prevailing

> party.' In fact, such an amendment was expressly rejected by the committee, largely on the grounds set forth in *NRDC* v. *EPA*, 484 F.2d 1331, 1388 (1st Cir. 1973)." [26]

These Reports expressly rejected any limitation on fee awards to the "prevailing party." They explicitly state that the "purposes of the authority to award fees" are to "assure proper implementation and administration of the act or otherwise serve the public interest." Every court which has interpreted section 307(f) or similarly-worded provisions has considered and implemented these purposes in reaching a fee award decision. See pp. 20-23, 26-27, *infra*. Similarly, in *Christiansburg Garment Co.* v. *Equal Employment Opportunity Commission*, 434 U.S. 412, 415-16 (1978), this Court recognized, in another statutory context, that discretionary fee award provisions "entrust . . . the effectuation of statutory policy to the discretion of the . . . courts."

The court of appeals' rationale for rejecting any "prevailing party" limitation in this case finds further support in the case cited by the House Reports, *Natural Resources Defense Council, Inc.* v. *EPA*, 484 F.2d 1331 (1st Cir. 1973) [hereafter cited as *NRDC* v. *EPA*]. In that case, the court held that a fee award was "appropriate" under section 304 for a party which only partially prevailed. However, the court's rationale, which the House Reports expressly adopted, is far broader:

> "The authorizing language of § 304(d) permits an award 'to any party, whenever the court determines such award is appropriate.' . . . *We are at liberty to consider not merely 'who won' but what benefits were conferred. The purpose of an award of costs and fees is not mainly punitive. It is to allocate the costs of litigation equitably, to encourage the achievement of statutory goals.* When the government is attempting to carry out a program of such vast and

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[26] H.R. Rep. No. 94-1175, 94th Cong., 2d Sess. 277 (1976); H.R. Rep. No. 95-294, 95th Cong., 1st Sess. 337 (1977), *reprinted in* Legislative History at 2804 (1979) (emphasis added).

> unchartered [sic] dimensions, there are roles for both the official agency and a private watchdog. The legislation is itself novel and complex. Given the implementation dates, its early interpretation is desirable. It is our impression, overall, that petitioners, in their watchdog role, have performed a service."
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> 484 F.2d at 1338 (emphasis added).

Thus the court recognized that the fundamental purpose for fee awards under the Clean Air Act is "to encourage the achievement of statutory goals." The central point, reflected in both the quoted passage and the House Reports which cited it, and conspicuously avoided by EPA (Pet. Brief at 27-28), is that fee awards are to be based on whether the litigation was "in the public interest." H.R. Rep. No. 94-1175, 94th Cong., 2d Sess. 277 (1976); H.R. Rep. No. 95-294, 95th Cong., 1st Sess. 337 (1977), *reprinted in* Legislative History at 2804.

The 1970 legislative history with respect to the enactment of section 304(d) of the Clean Air Act also supports the court of appeal's interpretation of section 307(f) in this case. In fact, it flatly contradicts EPA's theory that fee awards under section 304(d) are limited to "successful" parties. Pet. Brief at 20. In describing section 304(d), the Senate report concisely states the governing principle as follows:

> "The court may award costs of litigation to either party whenever the court determines that such an award is in the public interest *without regard to the outcome of the litigation.*"
>
> S. Rep. No. 91-1196, 91st Cong., 2d Sess. 65 (1970) (emphasis added).

This report accompanied a bill in which the fee award provision provided that the court might award attorney fees whenever it determined that an award would be "in the public interest." S. 4358, 91st Cong., 2d Sess. § 304 (1970). At another point, the same report states that under section 304, "the courts may award costs of litigation, including reasonable attorney and expert witness

fees, whenever the court determines that such action is in the public interest." S. Rep. 91-1196, 91st Cong., 2d Sess. 38 (1970). These repeated statements of the operative standard directly contradict any suggested limitation of fee awards to "successful" parties.

If, for the sake of argument, it were true that Congress in 1970 intended fee awards to be limited to "successful" parties, the 1977 legislative history indicates that the 95th Congress intended no such restricted standard to apply under section 304(d) or section 307(f). In fact, EPA's argument that Congress intended section 307(f) to be no broader than section 304(d) has no support.[27] Moreover, even if Congress intended section 307(f) to parallel section 304(d), that is because Congress, in 1977, recognized that section 304(d) had been broadly construed and chose to endorse that judicial interpretation, rejecting a proposed limitation of section 304(d) to parties who "prevail" or "prevail in part."

In 1977, the staff of the Senate Committee on Environment and Public Works compared the two Senate bills introduced in that year. The Report noted that the attorney fee provision of S. 252, quoted above, would have limited fee awards to those who prevail or prevail in part and would have applied to "any judicial proceeding under this Act." See text quoted at pp. 14-15. This would have included citizen suits under section 304,[28] as well as

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[27] The only support cited by EPA for its contention is a passage from a Senate report, quoted in the government's brief at page 17, which merely states that the committee had originally intended to provide a fee award provision in § 307 in 1970 and was, in 1977, responding to court decisions which held that fee awards could not be made under that section absent statutory authorization. Indeed, in describing the operative standard of § 307(f), that a court "*may* in its discretion, award costs of litigation to a party *bringing a suit* under section 307," S. Rep. No. 95-127, 95th Cong., 1st Sess. 99 (1977) (emphasis added), the committee expressed a standard which is broader than that advanced by the government in this case.

[28] This is confirmed by the Report's description of the proposal. See Staff Of The Subcommittee On Environmental Pollution Of The Committee On Environment And Public Works, 95th Cong., 1st

the new provision of section 307(f). Thus, S. 252 would have restricted the existing fee award provision of section 304, which was originally enacted to authorize fee awards "in the public interest without regard to the outcome of the litigation."[29] In light of these proposed restrictions, the Report notes that one area of controversy related to the provision was:

> "Is there any need to modify *the existing judicial practice of awarding fees based on the individual circumstances of each case?*"
>
> Staff Report at 37, *reprinted in* Legislative History at 3893 (emphasis added).

The Senate Committee thus squarely faced the issue presented in this case: should the courts' discretion to award fees be limited to parties who "prevail in part," or should the courts continue to award fees "based on the individual circumstances of each case?" By rejecting any proposed limitation on section 304 and leaving that section unchanged, Congress endorsed the "existing judicial practice."

The judicial practice which Congress approved is reflected by two district court opinions which specifically rejected the contention here advanced by EPA that "success" is a prerequisite to a fee award. In *Delaware Citizens for Clean Air, Inc.* v. *Stauffer Chemical Co.*, 62 F.R.D. 353 (D. Del. 1974), *aff'd mem.*, 510 F.2d 969 (3rd Cir. 1975), the court considered an application for attorney fees by a citizens' group which had challenged unsuccessfully the defendant's right to emit sulfur dioxide above certain levels. In concluding that an award of fees was not appropriate under section 304 of the Act, the court observed that a limitation of awards to a prevailing party was "notably missing" from the Act and concluded that "ultimate success in a citizen's suit was not intended

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Sess., *A Section-By-Section Analysis Of S.252 And S.253 Clean Air Act Amendments* 37 (Comm. Print 1977), *reprinted in* Legislative History at 3893 (hereafter "Staff Report").

[29] S. Rep. No. 91-1196, 91st Cong., 2d Sess. at 65 (1970).

to be a prerequisite to an award." 62 F.R.D. at 355. Although the outcome of the case was a relevant factor, the court concluded that, in exercising its "equitable judgment," it could and should award fees to a losing party if the litigation "served the objectives of the Act in some substantial way . . . ." *Id.* The court concluded that a fee award was not appropriate on the facts of the case because the suit had not induced the defendant to act in some way which benefited the public, nor had it "in any other tangible or direct way contributed to achievement of the objectives of the Clean Air Act." *Id.* Thus, although it reached a different conclusion on the facts of its case, the court in *Delaware Citizens* interpreted section 304 in the same manner as the court of appeals herein.

In *Citizens Association of Georgetown* v. *Washington*, 383 F. Supp. 136 (D.D.C. 1974), *modified*, 535 F.2d 1318 (D.C. Cir. 1976) (reversed as to award of attorneys' fees for lack of jurisdiction), plaintiffs sought to prevent completion of two private construction projects on the Georgetown waterfront in an action brought under section 304 of the Act. Although plaintiffs were unsuccessful in their suit, the court concluded that the case was "an exceptional case" in which a fee award was appropriate. The court reviewed the statutory language and legislative history and reasoned that "success or failure on the merits has nothing to do with the trial court's *power* to award costs and attorneys' fees in citizen suits under the Clean Air Act." 383 F. Supp. at 144 (emphasis in original). Accordingly, the court concluded that "an award is appropriate if the suit has benefited the public interest as declared in the Clean Air Act." *Id.* The court further reasoned that "the advancement of an important legislative policy may justify the award of costs and fees even where the plaintiff does not obtain the ultimate relief he seeks." *Id.*

These decisions are squarely in line with the court of appeals' decision in this case and directly contrary to EPA's position. Congress' endorsement of them, together with its rejection of limiting language for both sections 304(d) and 307(f), renders EPA's position untenable. It is immaterial what section 304(d), which is not involved in this case, was originally intended to mean. When Congress enacted section 307(f) in 1977 it intended to confer discretion on the courts to award fees without limitation to "successful" or "prevailing" parties.

D. The Court of Appeals' Interpretation Has Been Confirmed by Every Federal Court to Address the Question.

Every federal court to consider the issue has concluded that Congress did not intend to restrict fee awards under the Clean Air Act in the manner now suggested by EPA. In convincing numbers, decisions interpreting the fee award provisions of the Clean Air Act have adopted the same interpretation as the court of appeals in this case. *Northern Plains Resource Council* v. *EPA*, 670 F.2d 847 (9th Cir. 1982); *Alabama Power Co.* v. *Gorsuch*, 672 F.2d 1 (D.C. Cir. 1982); *Metropolitan Washington Coalition for Clean Air* v. *District of Columbia*, 639 F.2d 802 (D.C. Cir. 1981); *NRDC* v. *EPA*, 484 F.2d 1331 (1st Cir. 1973); *Delaware Citizens for Clean Air, Inc.*, v. *Stauffer Chemical Co.*, 62 F.R.D. 353 (D. Del. 1974), *aff'd mem.*, 510 F.2d 969 (3rd Cir. 1975); *Citizens Association of Georgetown* v. *Washington*, 383 F. Supp. 136 (D.D.C. 1974), *modified*, 535 F.2d 1318 (D.C. Cir. 1976) (reversed as to award of attorneys' fees for lack of jurisdiction).

Each of these cases has rejected the concept, advanced by EPA here, that fee awards under sections 304(d) and 307(f) are restricted in some manner based upon the outcome of the litigation. Thus every court interpretation

of the attorney fee provisions of the Clean Air Act supports the decision of the court of appeals in this case.

E. Comparison With Other Fee Award Statutory Provisions Confirms the Court of Appeals' Interpretation of Section 307(f).

The court of appeals' decision is further supported by a comparison of that provision with other statutory fee award provisions. In the vast majority of fee award statutes, Congress has limited the discretion of the court by requiring that fees be awarded only to parties who have achieved some specified measure of success in the litigation, typically a "prevailing party," [30] a "successful party," [31] or a "substantially prevailing party." [32] Although more than 150 fee award provisions have been enacted,[33] only 20 authorize attorney fee awards whenever the court determines it to be "appropriate." [34] Although those 20 provisions are not limited to "successful"

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[30] See note 14, *supra*.

[31] See note 15, *supra*.

[32] *E.g.*, Freedom of Information Act, 5 U.S.C. § 552(a)(4)(E); Privacy Act, 5 U.S.C. §§ 552a(g)(2)(B), (g)(3)(B); Government in the Sunshine Act, 5 U.S.C. § 552b(i).

[33] See note 12, *supra*.

[34] Toxic Substances Control Act, 15 U.S.C. §§ 2618(d), 2619(c)(2), 2622(b)(4)(C); Endangered Species Act of 1973, 16 U.S.C. § 1540(g)(4); Surface Mining Control and Reclamation Act of 1977, 30 U.S.C. § 1270(d) (Supp. IV 1980); Deep Seabed Hard Mineral Resources Act, 30 U.S.C. § 1427(c) (Supp. IV 1980); Clean Water Act, 33 U.S.C. § 1365(d); Marine Protection, Research and Sanctuaries Act of 1972, 33 U.S.C. § 1415(g)(4); Deep Water Port Act of 1974, 33 U.S.C. § 1515(d); Safe Drinking Water Act, 42 U.S.C. § 300j-8(d); Noise Control Act of 1972, 42 U.S.C. § 4911(d); Energy Reorganization Act of 1974, 42 U.S.C. § 5851(e)(2) (Supp. IV 1980); Energy Policy and Conservation Act, 42 U.S.C. § 6305(d); Resource Conservation and Recovery Act, 42 U.S.C. § 6972(e); Clean Air Act, 42 U.S.C. §§ 7604(d), 7607(f), 7622(e)(2); Power Plant and Industrial Fuel Use Act of 1978, 42 U.S.C. § 8435(d) (Supp. IV 1980); Ocean Thermal Energy Conversion Act of 1980, 42 U.S.C. § 9124(d) (Supp. IV 1980); Outer Continental Shelf Lands Act, 43 U.S.C. § 1349(a)(5) (Supp. IV 1980).

parties, they are located in 16 statutes, some of which contain other fee award provisions[35] which all require by their terms that the fee applicant establish "a violation" or succeed in obtaining an order in his favor. Thus, a comparison with other statutory provisions indicates that one of the most unusual features of section 307(f) is the absence of any restriction based upon the outcome of the litigation.

It is well established that where a statute with respect to a subject contains a given provision, the omission of such a provision from a similar statute is significant to show that a different intention existed. *United States* v. *Wittek*, 337 U.S. 346, 365-66 (1949); *Richerson* v. *Jones*, 551 F.2d 918, 927-28 (3rd Cir. 1977); *General Electric Company* v. *Southern Construction Company*, 383 F.2d 135, 138 n.4 (5th Cir. 1967), *cert. denied*, 390 U.S. 955 (1968); 2A Sands, *Sutherland Statutory Construction* § 51.02, at 291 (4th ed. 1973). Section 307(f) differs from other fee award provisions because Congress deliberately omitted precisely the kind of restriction which EPA here urges this Court to impose. This confirms the court of appeals' conclusion that the omission was deliberate and that EPA's restrictive interpretation should be rejected.

In addition to the omission of any "prevailing" or "successful" party limitation, section 307(f) is unusual in another respect. Of the many statutory fee award provisions enacted by Congress, we have found only three which authorize fee awards *at all* in judicial proceedings to review agency regulations: Clean Air Act section 307(f), Consumer Product Safety Act ("CPSA") sec-

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[35] Toxic Substances Control Act, 15 U.S.C. § 2622(b)(2)(B); Surface Mining Control and Reclamation Act, 30 U.S.C. §§ 1270(f), 1275(e), 1293(c); Clean Water Act, 33 U.S.C. § 1367(c); Safe Drinking Water Act, 42 U.S.C. § 300j-9(i)(2)(B)(ii); Energy Reorganization Act of 1974, 42 U.S.C. § 5851(b)(2)(B) (Supp. IV 1980); Resource Conservation and Recovery Act, 42 U.S.C. § 6971(c); Clean Air Act, 42 U.S.C. §§ 7413(b), 7622(b)(2)(B); Outer Continental Shelf Lands Act, 42 U.S.C. § 1349(b)(2).

tion 24 (15 U.S.C. § 2060(c)), and Toxic Substances Control Act ("TSCA") section 19(d) (15 U.S.C. § 2618 (d)).[36] Section 307(f) and TSCA section 19(d) each authorize awards when the court finds it to be "appropriate" and CPSA section 24 empowers the court to award fees if found to be "in the interest of justice." None of the three provisions contains a limitation to a "prevailing" or "successful" party, although other fee award provisions in the same statutes do require that an order be issued in the fee applicant's favor or that a violation of the Act be established.[37] Moreover, all three provisions were enacted at approximately the same time and have the same general purpose. Thus, although these statutes are not directly involved in this case, their legislative histories are helpful in discerning Congress' intent with respect to section 307(f), especially in light of the striking similarities in the expressions of legislative intent. *Northcross* v. *Memphis Board of Education*, 412 U.S. 427 (1973). The legislative histories of the TSCA and CPSA provisions both explicitly state that those provisions are to be liberally construed to effectuate their purposes and that a fee award would be appropriate "where such award is in the public interest without regard to the outcome of the litigation."[38] Thus, the court of ap-

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[36] CPSA authorizes the Consumer Product Safety Commission to issue safety rules for consumer products, violations of which can result in the removal of hazardous products from the marketplace. Under TSCA, the administrator of EPA promulgates regulations concerning the testing, manufacture, and processing of chemical substances. Although some other statutes dealing with public health and safety provide special judicial review provisions for agency promulgations, none provides for an award of attorney fees. *E.g.*, Clean Water Act, 33 U.S.C. § 1369; Resource Conservation and Recovery Act, 42 U.S.C. § 6976 (Supp. IV 1980); Outer Continental Shelf Lands Act, 43 U.S.C. § 1349(c) (Supp. IV 1980); Surface Mining Control and Reclamation Act of 1977, 30 U.S.C. § 1276 (Supp. IV 1980).

[37] Clean Air Act, 42 U.S.C. § 7622(b)(2)(B); TSCA, 15 U.S.C. § 2622(b)(2)(B); CPSA, 15 U.S.C. § 2072(a).

[38] With respect to TSCA, see 122 Cong. Rec. 32854 (1976) (remarks of Sen. Tunney) and 122 Cong. Rec. 8300-01 (1976) (re-

peals decision in this case is directly supported by the legislative histories of the only other provisions which authorize fee awards in proceedings to review agency regulations.

The court of appeals' decision in this case is also supported by the case law under statutes other than the Clean Air Act which authorize the courts to make awards of attorney fees when found to be "appropriate." In *EDF* v. *EPA*, 672 F.2d 42 (D.C. Cir. 1982), *petition for reh'g pending*, No. 79-1580 (March 1982), decided the same day as the fee award decision in this case, a different panel of the District of Columbia Circuit made an award of attorney fees to EDF under TSCA section 19(d) for partial success in litigation challenging the validity of EPA regulations. Quoting the decision in this case, the court there concluded that the statutory language on its face authorized fee awards to "prevailing, substantially prevailing, or non-prevailing parties in 'appropriate cases.'" 672 F.2d at 48. The court's interpretation was confirmed by comparison with other fee award provisions and by a review of the TSCA legislative history, in which the ranking Senate Manager on the Conference Committee stated that the fee award provision "is not restricted to plaintiffs or successful parties." 672 F.2d at 48; 122 Cong. Rec. 32855 (1976) (remarks by Sen. Magnuson).

In *Village of Kaktovik* v. *Watt*, 689 F.2d 222 (D.C. Cir. 1982), the court of appeals reversed an award of attorney fees in a citizen suit enforcement action under the Outer Continental Shelf Lands Act, 43 U.S.C. § 1349 (Supp. IV 1980), and the Endangered Species Act, 16 U.S.C. § 1540(g). At the outset, Judge Wilkey noted that although plaintiffs ultimately lost on all issues, "this need not bar the award of attorney's fees and costs . . . ."

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marks of Sen. Tunney). For CPSCA, see the Conference Committee Report, H.R. Rep. No. 94-1022, 94th Cong., 2d Sess. at 1025 (1976).

689 F.2d at 224. Rather, the opinion recognized that the fee award decision in the present case relied on the principle that fees were to be awarded if the litigation substantially contributed to the goals of the underlying statute. *Id.* However, the court distinguished the present case in two important respects. First, it noted that in contrast to the Clean Air Act, one of the statutes involved in *Kaktovik* had as one of its primary goals the expeditious development of offshore resources, which had been hindered, not advanced, by the plaintiffs' action. Second, the court recognized that the factual situation in the present case was "exceptional" in light of the importance, novelty and complexity of the issues raised. 689 F.2d at 227-28. Judge Wilkey reemphasized "that the mere fact that a plaintiff is *unsuccessful* should not blind a Court to the possibility that its efforts may nonetheless make an award of attorney's fees and costs appropriate. *Each case, each plaintiff must be judged individually.*" 689 F.2d at 228 (emphasis added). *See also Carpenter* v. *Andrus*, 499 F. Supp. 976 (D.Del. 1980).

F. The Doctrine of Sovereign Immunity Poses No Bar to the Court of Appeals' Award of Attorney Fees.

EPA's argument that section 307(f) does not "contain the requisite waiver of sovereign immunity" and that the doctrine of sovereign immunity "requires that Section 307(f) be strictly construed in the government's favor," (Pet. Brief at 11) has absolutely no foundation.[39] Sover-

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[39] EPA contends that "the Court of Appeals ignored the doctrine of sovereign immunity." (Pet. Brief at 11). Here the Court of Appeals did not "ignore" the doctrine of sovereign immunity. It did not *explicitly* address the doctrine because it was unnecessary for the court to do so, in view of its exhaustive discussion of the "Authority Under Section 307(f) to Grant Attorney's Fees to Non-Prevailing Parties" in Part I of its February 5, 1982 opinion. (Pet. 2a-13a, 672 F.2d at 34-39).

Significantly, this Court also "ignored" the doctrine of sovereign immunity in the same manner in *Chandler* v. *Roudebush*, 425 U.S. 840 (1976), decided on ordinary principles of statutory construction despite arguments bearing on sovereign immunity made by the government. Brief for the Respondents at 32, 33, *Chandler* v. *Roude-*

eign immunity is a defense by the sovereign that it has not consented to suit for the particular kind of claim asserted or that it did so with certain explicit procedural conditions which have not been satisfied. The case law indicates that sovereign immunity requires "strict construction" to resolve ambiguities in favor of the government in three circumstances: (1) in determining whether the court has subject matter jurisdiction to entertain a claim against the United States of the sort presented to it (*United States* v. *Sherwood*, 312 U.S. 584, 586-88 (1941); *United States* v. *King*, 395 U.S. 1, 4 (1969)); (2) in determining whether the law authorizes the court to award the particular remedy sought, if the claim is established (*United States* v. *Testan*, 424 U.S. 392, 398-402 (1976); *United States* v. *Mitchell*, 445 U.S. 535, 537-38 (1980), *on remand*, 664 F.2d 265, 267-68 (Ct. Claims 1981), *cert. granted*, 102 S. Ct. 2901 (June 7, 1982); *Army & Air Force Exchange Service* v. *Sheehan*, 102 S. Ct. 2118 (June 1, 1982)); and (3) in determining whether any express procedural conditions or limitations on the waiver have been satisfied (*McMahon* v. *United States*, 342 U.S. 25, 26-27 (1951); *United States* v. *Kubrick*, 444 U.S. 111, 117-18 (1979); *Lehman* v. *Nakshian*, 453 U.S. 156, 160-61 (1981) (dictum)).

EPA has explicitly conceded that section 307(f) constitutes a waiver of immunity for the award of attorney fees against the government and a rejection of the traditional "American Rule" against fee shifting. Pet. at 15. Thus, the government has conceded that the court of appeals had subject matter jurisdiction to entertain claims for fee awards and that, as a matter of substantive law, the court is authorized to award the remedial measure sought, *i.e.*, the fee award. Accordingly, the only remaining applicability of "strict construction" is in determining whether any procedural limitations have been satisfied.

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bush, 425 U.S. 840 (1976). *Cf. Hackley* v. *Roudebush*, 520 F.2d 108, 122 n.53 (D.C. Cir. 1975).

In this respect, section 307(f) explicitly provides only one prerequisite for a fee award: a determination by the court that an award is appropriate. Obviously that limitation has also been satisfied. Thus, all the terms of section 307(f) for which strict construction is warranted have been met.

EPA, however, would apply the strict construction principle in a new context: to restrict the substantive terms intended to guide the court's discretion. There are several serious problems with this contention. First, it is contrary to the plain meaning of section 307(f), which must be derived from reading all its words in context. EPA, however, attempts to isolate the word "appropriate" and impose upon it a "strained and unnatural" construction. *See Chandler* v. *Roudebush*, 425 U.S. 840, 848 (1976). Here the term "appropriate" can only be interpreted in context with the rest of the provision. Section 307(f) authorizes a fee award *"whenever* [the court] determines such award is appropriate." EPA would imply restrictive meaning into a provision which is expressly not restrictive. Such an argument is directly contrary to the rule enunciated by this court that, "In construing a statute, we are obliged to give effect, if possible, to every word used." *Reiter* v. *Sonotone Corporation*, 442 U.S. 330, 339 (1979).

EPA relies heavily on *Lehman* v. *Nakshian*,, 453 U.S. 156 (1981), Pet. Brief at 12, to support its argument that the word "appropriate" imposes a restrictive meaning. That case does not concern any limitation on a substantive standard, as EPA would have the court impose here. The sole question there was whether plaintiff was entitled to the procedural right to a jury trial in the determination of his claim. Moreover, in *Lehman* the statutory provision waiving sovereign immunity and authorizing actions against the government was silent as to the right to jury trial, while the section providing

a right of action against private employees was later amended to provide such a right expressly. Based on this fact, the Court concluded that it was "unnecessary to go beyond the language of the statute itself" to resolve the case. 453 U.S. at 165. The Court also found that the legislative history confirmed its reading. *Id.* at 165-68. Finally, in dictum, the majority suggested that even if the legislative history were ambiguous, plaintiff would not be entitled to a jury since sovereign immunity would require the right to a jury to be "affirmatively and unambiguously" stated. *Id.* at 168.

In the present case, both the statutory language and legislative history "affirmatively and unambiguously" indicate that Congress intended to confer discretion on the courts without limiting that discretion to "prevailing" or "successful" parties. Thus, *Lehman's* findings of a procedural condition on the waiver of sovereign immunity provides no support for EPA's attempt to narrow the substantive terms of section 307(f) in this case.

The second defect in EPA's argument is its lack of support. In section 307(f) the term "appropriate" provides a substantive standard intended to guide the court's determination. We are aware of no authority for the proposition that the principle of strict construction extends to such terms. Indeed, the case law suggests the contrary. In *Indian Towing Co.* v. *United States*, 350 U.S. 61 (1955), for example, owners and insurers of a tugboat sued the United States, alleging that the negligent operation by the Coast Guard of a lighthouse caused the tug and the barge it was towing to run aground. The government moved to dismiss the case arguing that the Act implicitly excluded liability for negligent performance of uniquely governmental functions. The Court rejected that argument, construing the Act in light of the "broad and just purpose" it was designed to serve, stating:

> "There is nothing in the Tort Claims Act which shows that Congress intended to draw distinctions so

> finespun and capricious as to be almost incapable of being held in the mind for adequate formulation."
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> 350 U.S. at 68.

In the present case, EPA would have the court apply a definition of "appropriate" that is "almost incapable of being held in the mind for adequate formulation."

In *Indian Towing*, the Court chose not to construe "strictly" the substantive right conveyed in the statute, stating:

> "Of course, when dealing with a statute subjecting the Government to liability for potentially great sums of money, this Court must not promote profligacy by careless construction. *Neither should it as a self-constituted guardian of the Treasury import immunity back into a statute designed to limit it.*"
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> 350 U.S. at 69 (emphasis added).

Although Congress deliberately intended to waive sovereign immunity in discretionary terms, EPA would have this Court resurrect the doctrine because the statute does not specifically address the particular factual situation here presented. Thus, EPA would "import immunity back into a statute designed to limit it."

The logical extension of EPA's argument is that all cases which did not apply such a strict construction on behalf of the government to the terms of other attorney fee statutes should be overruled. EPA cites several cases indicating that the terms of other fee award statutes, such as "prevailing party" or "substantially prevailing party," have been construed liberally, even against the federal government. Pet. Brief at 20 n.13. EPA cites these cases with no suggestion that they were decided incorrectly. Nevertheless, cases such as those making awards of attorney fees to Title VII discrimination complainants and to Freedom of Information Act plaintiffs who prevailed short of judgment were, under EPA's theory, wrongly decided because the courts did not apply the strict construction principle.[40]

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[40] *See, e.g., Parker* v. *Mathews*, 411 F. Supp. 1059 (D.D.C. 1976). *Cuneo* v. *Rumsfeld*, 553 F.2d 1360 (D.C. Cir. 1977). These and the

In fact, if the principle of strict construction did pertain to substantive standards, application of the principle would require standards for all factual determinations by the trier-of-fact to be construed in the government's favor. If that premise were correct, then in every case arising under the Federal Tort Claims Act (28 U.S.C. § 2671 *et seq.*), for example, the court would be required to construe the term "negligence" narrowly in favor of the government, but not with respect to a private codefendant. Such a result is obviously not intended by Congress.

Even if EPA's premise were correct that the term "appropriate" should be strictly construed, the discussion regarding the meaning of "appropriate" in the legislative history should satisfy any inquiry into its construction. The relevant consideration is the question of congressional intent expressed in the statute. *Federal Land Bank* v. *Priddy*, 295 U.S. 229, 231 (1935); *Eastern Transportation Company* v. *United States*, 272 U.S. 675, 689 (1927). It is well established that in construing a waiver of sovereign immunity, the statute should be read "according to the natural and obvious import of the language, without resorting to subtle and forced construction for the purpose of either limiting or extending its operation." *Moore*

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other cases cited by EPA (Pet. Brief at 21 n.13) all allow payment of attorney fees to plaintiffs who "prevail" short of judgment. Moreover, in *Cuneo*, the court specifically addressed the question of sovereign immunity as it related to the retroactivity of the attorney fees provision of the Freedom of Information Act. The court rejected the government's "strict construction" approach explicitly:

> "The government contends that since statutes waiving the sovereign immunity of the federal government are to be strictly construed . . . and that since section 552(a)(4)(E) is silent on the issue of retroactivity, Congress must not have intended it to apply to legal services rendered prior to its enactment. The legislative history, however, reveals that Congress intended that the courts should look to the existing body of law on the award of attorney fees in determining whether award is appropriate."
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> 553 F.2d at 1366-67.

v. *United States*, 249 U.S. 487, 489 (1919); *United States* v. *Temple*, 105 U.S. 97, 99 (1881). In *Canadian Aviator, Limited* v. *United States*, 324 U.S. 215 (1945), this Court was presented with the question whether the phrase "damages caused by a public vessel" of the Public Vessels Act was limited to damages caused by collision. After reviewing the statutory language and history, the Court concluded that:

> "While the general history of the Act as outlined above does not establish that the statute necessarily extends to the noncollision cases in view of the rule of strict construction of statutory waivers of sovereign immunity . . ., we think congressional adoption of broad statutory language authorizing suit was deliberate and is not to be thwarted by unduly restrictive interpretation."

324 U.S. at 222 (citations omitted).

In the present case, even under a strict construction of the term "appropriate," section 307(f) authorizes the courts to make fee awards based upon the public interest as expressed in the goals of the Act, "without regard to the outcome of the litigation."[41] The "strict construction"

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[41] S. Rep. No. 91-1196, 91st Cong., 2d Sess. 65 (1970). Just as the provisions for attorney fees in TSCA (15 U.S.C. § 2618(d)) and CPSA (15 U.S.C. § 2060(c)), *see* text *supra* at 24-26, "should be liberally construed to effectuate the purpose" of the statute (122 Cong. Rec. 32854 (1976) (re: TSCA); H.R. Rep. No. 94-1022, 94th Cong., 2d Sess. 23 (1976) (re: CPSA)), so too should Clean Air Act section 307(f). In this regard, EPA's position in this case is not unlike that taken by the government in *Chewning* v. *Schlesinger*, 471 F. Supp. 767 (D.D.C. 1979), in which it argued that principles of strict construction barred a Civil Rights Act Title VII employment discrimination action. There the court said:

> "The defendant insists, however, that, because the terms of the 1972 Act are silent on the issue of the government's liability in damages for pre-Act discrimination, full retroactive application of Section 717 would violate the rule of strict construction followed in waivers of sovereign immunity. ***This attempt to constrict the scope of the waiver intended by Congress is directly at odds with the principle that remedial statutes, in-***

principle does not support EPA's argument here any more than it did in *Indian Towing*, *Eastern Transportation Company*, or *Canadian Aviator*. As the Court of Appeals for the Fifth Circuit said in *De Bardeleben Marine Corp.* v. *United States*, 451 F.2d 140, 142 (1971):

> "It is often said that the doctrine of sovereign immunity is a derivative of the common law maxim 'the king can do no wrong'. But conceptually it is far older. Zeus himself carried an aegis or breastplate, a buckler, and a thunderbolt which made him, the mythological sovereign, immune from all that could beset him. And common law provided its sovereign with the immunity of Zeus. Yet Zeus saw fit to strip himself of this protection by giving it to Athena, whereas modern sovereigns have shown much reluctance to do likewise. Probably more accurately, the reluctance comes from the advocative arm of the Government contending for a restrictive reading of legislative amelioration."

Here Congress' waiver of immunity should be given its intended effect.

II. THE COURT OF APPEALS DID NOT ABUSE ITS DISCRETION.

The decision whether to award attorney fees in this case is committed to the discretion of the court of appeals, where the matter originated. The lower court's action may be reversed only where there has been a *clear* abuse of discretion. *American Pipe and Construction Co.* v. *Utah*, 414 U.S. 538, 560, *reh'g denied*, 415 U.S. 952 (1974); *Brotherhood of Railroad Trainmen* v. *Baltimore & Ohio Railroad Co.*, 331 U.S. 519, 524 (1947); *Allen Calculators, Inc.* v. *National Cash Register*, 322 U.S. 137, 142 (1944). An abuse of discretion requires judicial action that is arbitrary, fanciful, or unreasonable. *Lindy*

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cluding those expressly involving the government, should be construed liberally."

471 F. Supp. at 774 (footnotes omitted, emphasis added).

Cf. Tcherepin v. *Knight*, 389 U.S. 332, 336 (1967); *Peyton* v. *Rowe*, 391 U.S. 54, 65 (1968).

Brothers Builders, Inc. of Philadelphia v. *American Radiator & Standard Sanitary Corp.*, 540 F.2d 102, 115 (3rd Cir. 1976); *Delno* v. *Market St. Railway Co.*, 124 F.2d 965, 967 (9th Cir. 1942). Judicial abuse of discretion is said to occur only when no reasonable person "could take the view adopted by the court." *Harrington* v. *DeVito*, 656 F.2d 264, 269 (7th Cir. 1981), *cert. denied*, 102 S. Ct. 1621 (1982); *Delno* v. *Market*, 124 F.2d 965. 967. The reviewing court should not substitute its independent judgment for that of the trial judge when assessing alleged errors committed within the exercise of discretion. *Mendoza* v. *United States*, 623 F.2d 1338, 1347 (9th Cir. 1980), *cert. denied*, 450 U.S. 912 (1981); *Copeland* v. *Marshall*, 641 F.2d 880, 901 (D.C. Cir. 1980) (*en banc*); *Charter Oak Fire Insurance Co.* v. *Mann*, 304 F.2d 166, 168 (8th Cir. 1962). Considerable deference must be paid to the lower court's allowance of attorney fees because the lower court is more familiar with the quality of counsel and has better knowledge to assess the course of litigation. *Copeland*, 641 F.2d at 901; *Pete* v. *UMW Welfare and Retirement Fund of 1950*, 517 F.2d 1275, 1289 (D.C. Cir. 1975).

The legislative history of section 307(f) clearly indicates that in exercising the discretion conferred, the guiding consideration is whether the litigation "served" the "public interest" as expressed in the goals of the statute. H.R. Rep. No. 95-294, 95th Cong., 1st Sess. 337 (1977). In this case, the court of appeals concluded that this litigation substantially contributed to the achievement of two goals of the Clean Air Act: "prompt resolution of serious questions of statutory interpretation and citizen participation in monitoring administration of the Act through enforcement suits." (Pet. at 18a; 672 F.2d at 41.) These objectives are unmistakably purposes of the Act, reflected in the statute and its legislative history.

The goal of citizen participation is reflected directly in section 307(d) of the Act, which provides not only an opportunity for written comment on proposed rules, but also an opportunity for any interested person to make an

oral presentation of views and a requirement that the record of such hearings be kept open for 30 days to receive rebuttal and supplementary information. 42 U.S.C. § 7607(d)(3), (d)(5)(ii), (d)(5)(iv). One major concern which led to the 1977 revisions of section 307(d) was the need for "adequate opportunity to challenge the factual basis underlying the proposed rule."[42] In its ruling on the merits of the case, the court referred specifically to the legislative history relating to these procedural provisions, which states:

> "For in the committee's view, appropriately broad administrative discretion to promulgate regulations must be restrained by thorough and careful procedural safeguards that insure an effective opportunity for public participation in the rulemaking process."[43]

The goal of prompt judicial resolution of substantial questions is also reflected in the Act itself. Section 307(b)(1), which provides for court of appeals review of certain actions of the Administrator, limits review of nationally applicable regulations to the District of Columbia Circuit. 42 U.S.C. § 7607(b)(1). The congressional desire for prompt and final resolution of the validity of such regulations is reflected by the 60-day statute of limitations and the statutory provision that issues which could have been raised by a petition for review may not be raised in a subsequent enforcement proceeding. 42 U.S.C. § 7607(b)(1), (2). Moreover, the House Report which accompanied the 1977 amendments also reflects this concern for prompt judicial resolution of serious issues concerning the validity of EPA actions.[44] Thus, Congress clearly contemplated a mechanism to resolve serious issues concerning the validity of discretionary agency actions expeditiously and with finality.

EPA suggests that the Act has a single legislative purpose, "to protect and enhance the quality of the

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[42] H.R. Rep. No. 95-294, 95th Cong., 1st Sess. 318 (1977).

[43] *Id.* at 319. The court referred to this passage. 657 F.2d at 398.

[44] *Id.* at 322.

nation's air resources," 42 U.S.C. § 7401(b)(1), Pet. Brief at 30, and argues that the court of appeals did not find that EDF furthered that objective. *Id.* at 30-31. Here, again, EPA misses the mark. There is little question that EDF sought to further the ultimate statutory goal, since it contended that the regulations were too lax. 657 F.2d at 311. Moreover, by advancing the objectives identified by the court, EDF furthered the ultimate statutory purpose as well. For example, the Act itself explicitly requires EPA, in the rulemaking process for NSPS, to balance varying viewpoints with regard to air quality, dangers to the public health, and costs of achieving emission reduction. Clean Air Act sections 111(f)(2), (h), 42 U.S.C. § 7411(f)(2), (h). By challenging EPA's *ex parte* communications with representatives of industry, Congress and other executive branch officials, EDF sought to enhance opportunities for public participation in decisions which directly affect air quality and the public health. As found by the court of appeals, EDF's challenge sought to protect the procedural integrity of this process. In advancing that objective, especially by representatives of environmental interests who otherwise lack a financial incentive to participate, the general goal of enhancement and protection of air quality is also served.

The court of appeals found that EDF's conduct of this litigation contributed to the goals of the Act in four primary ways: (1) EDF helped to clarify the law with respect to important, novel and complex questions, Pet. at 13a, 672 F.2d at 39; (2) as a result of EDF's efforts, evidence documenting the alleged *ex parte* contacts with the agency were made available to the court and the public for the first time, Pet. at 18a, 672 F.2d at 41; (3) EDF's efforts assisted and educated the court and provided balanced representation of competing interests in resolving the highly technical and complex issues in the case, *id.*; and (4) judicial resolution of the issues raised by EDF provided guidance to EPA and a basis for evaluation of informal rulemaking procedures for the

entire executive branch. *Id.* In basing its decision on these factors, the court of appeals weighed traditional considerations supporting attorney fee awards in the past, even, in some cases, to unsuccessful parties. The court of appeals' decision should be upheld unless EPA shows that the court's reliance on these factors was a clear abuse of discretion. Significantly, EPA's brief does not even address that question.

A. Clarification of the Law Regarding Important, Novel and Complex Questions.

In its decision to award fees, the court of appeals found that "EDF's procedural challenges . . . clarified how the new section 307(d) would operate . . ." and applauded the "critical role played by EDF in the court's premier interpretation of the new rulemaking procedures laid down in the 1977 Amendments," a review that was "necessary in order to resolve close questions of interpretation" under the Act. Pet. at 18a, 17a, 18a; 672 F.2d at 41.

There is no dispute concerning the significance of the ultimate issues involved in this case; the importance of the case to the national welfare was acknowledged by all the parties. Pet. at 14a; 672 F.2d at 39. Moreover, resolution of the specific issues raised by EDF has been widely recognized as clarifying the law concerning proper informal rulemaking procedures. EDF challenged the regulations in part on the basis that the agency had improperly received written comments and permitted *ex parte* communications after the close of the comment period. Of central importance were two meetings involving high level EPA officials, one with the Senate Committee staff and another with the President, neither of which had been recorded in the rulemaking docket. Although the Clean Air Act is silent concerning oral communications after the close of the comment period, the court of appeals' ruling established important restrictions on such communications. While upholding the regulations, the court nonetheless indicated that oral communications

of "central relevance to the rulemaking" must be entered in the rulemaking docket. 657 F.2d at 402. In addition, the court of appeals rejected EPA's position when it concluded that written inter-agency communications during the comment period are not exempt from the docketing requirement, 657 F.2d at 405 n.519, thus indicating that they are included by the Act in the record for judicial review. In both these respects, the court of appeals' decision established important limits on a broad claim of executive branch confidentiality asserted by EPA.

The court of appeals' resolution of these issues has been widely recognized as an important development in the law of *ex parte* communications in informal rulemaking and with respect to the more fundamental question of presidential intervention in executive branch rulemaking proceedings. The latter question is especially significant in light of increased involvement of the White House and OMB in informal rulemakings on the basis of Executive Order No. 12291, 3 C.F.R. 127 (1982), *reprinted in* 5 U.S.C. § 601 app. at 136-38 (1981). However, even without presidential involvement, the issue of *ex parte* communications had been the subject of apparently conflicting judicial opinions which this case helped to resolve with respect to the Clean Air Act.[45] For example, one commentator suggested that *Sierra Club* v. *Costle* "could prove to be a landmark development in administrative law," that although it was decided only six months previously, it had "already . . . assumed a position of some prominence in administrative law," and that it "appears likely to have significant impacts on both Clean Air Act standards-setting procedures and administrative principles." *D.C. Circuit Upholds NSPS*, 11 Envtl. L. Rep. 10218 (1981). A leading treatise on the subject of administrative law has recognized that the case is of

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[45] *See* cases cited in *D.C. Circuit Upholds NSPS for Coal-Fired Plants, Ratifies White House, Congressional Input into Rulemaking*, 11 Envtl. L. Rep. 10218, 10222 n.45 (hereafter "*D.C. Circuit Upholds NSPS*"). *See also* K. Davis, *Administrative Law* § 6.18 (Supp. 1982).

"major importance to the law of *ex parte* communications" and devotes several pages to discussing the implications of the case for the legality of presidential intervention in rulemaking. K. Davis, Administrative Law §§ 6:18 at 117-18, 6:40 at 156-59 (Supp. 1982). *See also* Schwartz, *Administrative Law Cases During 1981*, 34 Ad. L. Rev. 83, 88-9 (1982).

This case also received prominent attention in a recent symposium on presidential intervention and informal rulemaking. Participants in the symposium recognized it as an important first judicial holding in the area. Verkuil, *Symposium on Presidential Control of Rulemaking: An Introduction*, 56 Tul. L. Rev. 811, 814 (1982); Cutler, *The Case for Presidential Intervention in Regulatory Rulemaking by the Executive Branch*, 56 Tul. L. Rev. 830, 841 (1982); Davis, *Presidential Control of Rulemaking*, 56 Tul. L. Rev. 849, 859 (1982). One participant in the symposium observed:

> "*Sierra Club* should resolve much of the controversy about the substance and procedure of White House intervention in the informal rulemaking process."
>
> Cutler, *supra*, 56 Tul. L. Rev. at 832.

EDF's challenge involved questions of interpretation which were not specifically addressed by the Clean Air Act amendments of 1977 or by EPA regulations.[46] Only one provision of section 307 addresses the question of post-comment period procedures, requiring that documents which EPA determines to be of "central relevance to the rulemaking" be placed in the docket. 42 U.S.C. § 7607(d)(4)(B)(i). The court of appeals noted that "nothing in the statute prohibits EPA from admitting all post-comment communications into the record; nothing expressly requires it either." 657 F.2d at 396-97 (footnotes omitted). Moreover, since that provision is limited to "documents," the court noted that "[o]ral face-to-

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[46] Despite its clear authority to do so, 42 U.S.C. § 7601(a)(1), EPA did not adopt regulations addressing the procedural issues raised by the newly-enacted § 307(d), and has not done so to date.

face discussions are not prohibited anywhere, anytime, in the Act." *Id.* at 400. Accordingly, the court was required "to glean the law for this case by inference from the procedural framework provided in the statute." *Id.* at 397. As observed by another participant in the symposium discussed above, the issue raised in this case was "a question which has been basically left unanswered by Congress." Morrison, *Presidential Intervention in Informal Rulemaking: Striking the Proper Balance*, 56 Tul. L. Rev. 879, 880 (1982). Thus, despite Congress' attempt to legislate a comprehensive scheme for informal rulemakings under section 307, the 1977 amendments left a gap which required judicial interpretation in order to resolve several questions with finality.

Several cases have awarded attorney fees on the basis of the benefits conferred by clarification of important questions of law. The potential for such benefits in judicial review proceedings under the Clean Air Act was clearly recognized by the First Circuit in *NRDC* v. *EPA*, 484 F.2d 1331 (1973), which was cited with specific approval in the 1977 legislative history.[47] As the First Circuit observed in that case:

> "Petitioners have thus helped to enforce, refine and clarify the law. They can be said to have assisted the EPA in achieving its statutory goals."
>
> 484 F.2d at 1334.

In *Northern Plains Resource Council* v. *EPA*, 670 F.2d 847 (9th Cir. 1982), discussed above, the court awarded fees to a non-prevailing party, in part, "because the suit presented issues important to the construction of the Clean Air Act . . . ." 670 F.2d at 849. Similarly, in *Save Our Sound Fisheries Ass'n* v. *Callaway*, 429 F. Supp. 1136 (D.R.I. 1977), the court emphasized the public benefits accruing from the lawsuit, noting "the importance of the rulings gained by the plaintiffs in this case . . ." which clarified the duties of the Corps of

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[47] H.R. Rep. No. 95-294, 95th Cong., 1st Sess. 337 (1977), discussed at pp. 17-18 above.

Engineers under the statutes there in issue. 429 F. Supp. at 1146 n.16. *See also Halperin* v. *Department of State*, 565 F.2d 699, 706 n.11 (D.C. Cir. 1977).

The need to remove ambiguity and clarify the applicable rules or laws has also been recognized as a legitimate basis for awarding attorney fees in other contexts, even to unsuccessful litigants. As the citations in the margin indicate, it is well established in many jurisdictions that an award may be properly made to a party who unsuccessfully claims an interest in a trust or estate, where there is an ambiguity either in the terms of the governing document or in the law itself.[48] Although there

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[48] *E.g., Union Central Life Insurance Co., Inc.* v. *Hamilton Steel Products, Inc.*, 493 F.2d 76 (7th Cir. 1974); *Troy Bank & Trust Co.* v. *Brantley*, 263 Ala. 428, 82 So. 2d 618 (1955); *Orme* v. *Northern Trust Co.*, 25 Ill. 2d 151, 183 N.E. 2d 505 (1962); *In re Estate of Sowder*, 185 Kan. 74, 340 P.2d 907 (1959); *Moore* v. *Alden*, 80 Me. 301, 14 A. 199, 201 (1888); *Deane* v. *Home for Aged Colored Women*, 111 Mass. 132 (1872); *In the Matter of Campbell's Trust*, 258 N.W. 2d 856 (Minn. 1977) (doctrine of allowance upheld but specific fees denied for lack of ambiguity); *Hereford* v. *Unknown Heirs of Tholozan*, 306 S.W. 2d 648, 650 (Mo. Ct. App. 1957) (limited to cases where litigant is not seeking a pecuniary benefit from the trust or estate); *In re Bittson's Trust*, 244 N.Y.S. 2d 926, 41 Misc. 2d 5 (App. Div. 1963); *Evans* v. *Adams*, 180 S.C. 214, 185 S.E. 57, 61 (1936) (finding the litigation especially beneficial because it resolved novel questions of law for which there was no recent precedent); *Moore* v. *Neely*, 212 Tenn. 496, 370 S.W.2d 537 (1963); *Monroe* v. *Winn*, 19 Wash. 2d 462, 142 P.2d 1022, 1024 (1943); Dawson, *Lawyers and Involuntary Clients: Attorney Fees From Funds*, 87 Harv. L. Rev. 1597, 1629-30 (1974); Annot., 9 A.L.R. 2d 1132. A sufficient ambiguity exists where there is an honest difference of opinion as to the proper construction of the disputed terms. *Tolman* v. *Reeve*, 393 Ill. 272, 65 N.E.2d 815 (1946); *Estate of Smith*, 68 Ill. App. 3d 30, 24 Ill. Dec. 451, 385 N.E.2d 363 (App. Ct. 1979); *Attorney General* v. *Moore's Executors*, 19 N.J. Eq. 503 (E. & A. 1868). In explaining allowances for attorney fees where there was a need for judicial resolution of an ambiguity, some courts have explicitly recognized the benefit to all parties concerned, resulting from the adjudication of the particular question. *E.g., Troy Bank & Trust Co.*, 82 So.2d 618; *Schenectady Trust Co.* v. *Emmons*, 263 A.D. 542, 33 N.Y.S.2d 688 (App. Div. 1942). *See also* Rowe, *The Legal Theory of Attorney Fee Shifting: A Critical Overview*, 1982 Duke L. J. 651 (1982).

are obvious factual differences between the present case and such cases, the basis for fee shifting is the same for both; where the litigation is brought in good faith to resolve an area of ambiguity, all the parties who are subject to the ambiguous rule or law benefit from the litigation which resolves the uncertainty.

In the present case, it certainly was not an abuse of discretion for the court of appeals to conclude that this litigation served the public interest in several pertinent respects. It clarified the law with respect to important issues: the propriety of *ex parte* contacts in informal agency rulemakings and the proper role for presidential involvement in such rulemakings. In addition, in rejecting the agency's broad claim of privilege and its interpretation of the Act in several respects, the court clarified EPA's responsibilities under the Act. Accordingly, by bringing this action EDF enabled the court to perform its proper role under section 307, to "enforce, refine and clarify the law." *NRDC* v. *EPA*, 484 F.2d at 1334. *See also Christiansburg Garment Co.* v. *EEOC*, 434 U.S. 412, 419 (1977).

B. Required Disclosure of Important Ex Parte Communications.

In determining that an award of attorney fees was appropriate, the court of appeals found:

> "Several documents pertaining to these contacts proferred by EPA for the first time on appeal, were consulted by the court. . . . We have little doubt that without EDF's substantial contribution to this aspect of the case, our deliberations would have been less enriched and more time consuming."
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> Pet. at 18a; 672 F.2d at 41.

In this litigation EDF challenged the propriety of nine meetings between EPA officials and persons outside the agency after the close of the comment period. Two of those meetings were never recorded in the rulemaking docket: a meeting with the President on April 30, 1979, and a meeting with Senate staff on May 1, 1979. EDF

learned of these meetings only by obtaining the calendar of an EPA official pursuant to the Freedom of Information Act. J. App. at 13. When EDF filed a motion for discovery pointing out the lack of documentation, J. App. at 14, EPA opposed the motion. Nonetheless the court of appeals ordered EPA to submit affidavits providing factual details concerning the meetings specified in EDF's motion. J. App. at 25. Thereafter, EPA filed affidavits providing some of the information specified in the court's order. EDF, in its brief on the merits, pointed out the lack of documentation concerning the meeting with the President and other meetings. It requested the court to require the submission of further documentation, whereupon EPA "voluntarily" provided that information by affidavit before the court could rule on EDF's request. J. App. at 26-29; *Sierra Club I*, 657 F.2d at 390-91. Thus, as a direct result of EDF's efforts, important information became available to the public and to the court of appeals which EPA had vigorously opposed disclosing. As one commentator observed, "it is vital to note that before upholding EPA's *ex parte* contacts, the court required that they be fully detailed in the record." Morrison, *Presidential Intervention in Informal Rulemaking: Striking the Proper Balance*, 56 Tul. L. Rev. 879, 893 n.31 (1982).

Several courts have recognized the legitimacy of attorney fee awards to parties who did not ultimately prevail on the merits of the litigation, based upon the value of exposure to the public and the court of information revealed during the course of the litigation. *Metropolitan Washington Coalition for Clean Air* v. *District of Columbia*, 639 F.2d 802, 804 (D.C. Cir. 1981); *Kopet* v. *Esquire Realty Company*, 523 F.2d 1005, 1008-9 (2d Cir. 1975) (merits of claim not yet determined, but deemed immaterial); *Citizens Association of Georgetown* v. *Washington*, 383 F. Supp. 136 (D.D.C. 1974), *modified*, 535 F.2d 1318 (D.C. Cir. 1976) (reversed as to award of attorneys' fees for lack of jurisdiction); *Sierra Club* v. *Lynn*, 364 F. Supp. 834, 848 (W.D. Tex. 1973), *rev'd*

in part on other grounds, 502 F.2d 43 (5th Cir. 1974), *cert. denied*, 421 U.S. 994 (1975).

By obtaining important disclosures of information over EPA claims of privilege, EDF clearly served the public interest. Certainly the court's conclusion to that effect was not an abuse of discretion. Although the Clean Air Act limits judicial review to the record compiled by the agency, 42 U.S.C. § 7607, EPA was nonetheless required, over its strenuous objection, to disclose information which had potential to affect the record. The fact that EPA was required to submit affidavits which the court considered in ruling on the merits established an important precedent under the Act concerning the need for a full, fair, and accurate record for the court's review. This is true notwithstanding the ultimate outcome on the merits of EDF's challenge to the regulations.

In addition, the subject matter of the information produced was also important since it concerned the manner in which section 307's procedural requirements had been implemented by EPA. The court required EPA to submit sworn statements of high officials concerning meetings with congressional leaders and the President himself, rejecting a broad claim of executive branch confidentiality. Those disclosures enabled the court to make an informed judgment concerning the propriety of the meetings in question.

C. Assistance to the Court and Balanced Representation of Competing Interests.

In its decision to award fees, the court of appeals found:

> "We have little doubt that without EDF's substantial contribution . . ., our deliberations would have been less enriched and more time consuming . . . .
>
> ". . . It was absolutely essential in a case of this dimension that this Court have expert and articulate spokesmen for environmental as well as industrial interests. The rulemaking not only involved highly technical and complex data, but controversial consid-

erations of public policy. Given the complexity of the subject matter, without competent representatives of environmental interests, the process of judicial review might have been fatally skewed.

"The questions raised by Sierra Club and EDF needed to be resolved; yet no other party had a sufficient economic interest at stake to represent them. Sierra Club and EDF were required to expend great efforts to perform their advocacy tasks well in matters of such technical complexity; their contribution to the Court's prompt disposition of all issues raised in the case was substantial."

Pet. at 18a-19a, *Sierra Club II*, 672 F.2d at 41.

The court of appeals' reliance on the need for balanced representation is especially appropriate in this case because section 307(f) was enacted, in part, in response to the decision in *Natural Resources Defense Council, Inc.* v. *EPA*, 512 F.2d 1351 (D.C. Cir. 1975), which emphasized the need for balanced representation in judicial review litigation under the Act. The court held that section 307, as enacted in 1970, did not provide authority to award attorney fees, but urged enactment of a fee award provision, recognizing the need for a balance in representation of industry and environmental interests:

"If Congress fails to act, there may come a day soon when EPA's determinations, though frequently attacked because they are too stringent, are only seldom contested because they are not stringent enough."

512 F.2d at 1357-58.

In several other cases, cited in the margin, courts have awarded attorney fees to non-prevailing parties based on the need for effective representation of competing parties and interests.[49] This factor bears directly on the re-

[49] *Troy Bank & Trust Co.* v. *Brantley*, 263 Ala. 428, 82 So.2d 618 (1955); *Estate of Smith*, 68 Ill. App. 3d 30, 24 Ill. Dec. 451, 385 N.E.2d 363 (App. Ct. 1979); *Central Trust Co.* v. *Harris*, 152 Kan. 296, 103 P.2d 902, 905 (1940); *In re Atwood's Trust*, 227 Minn. 495, 35 N.W.2d 736, 740 (1949); *In re Bittson's Trust*, 244 N.Y.S.2d 926, 41 Misc.2d 5 (App. Div. 1963); *Schenectady Trust Co.* v.

sult in this case. The interests which EDF and Sierra Club represent would have been unrepresented without their participation in this case. Moreover, section 111 of the Act, under which the NSPS in issue in this case was promulgated, explicitly requires that environmental, economic and energy supply considerations be balanced in establishing the emission limitations. 42 U.S.C. § 7411 (a)(1). Thus, the court of appeals' concern for balanced representation reflected a policy concern which is reflected not only in the legislative history, but in the operative provision of the Act itself. Moreover, the court of appeals recognized the assistance it received as a result of EDF's participation when it explicitly acknowledged the value of EDF's factual research and legal analysis. Pet. at 17a; 672 F.2d at 41. For example, without EDF's efforts, the court and the public would have been unaware of the substance of many of EPA's *ex parte* contacts, or that some had even occurred. Based on its first-hand familiarity with this case, the court also concluded that the caliber of EDF's written and oral presentations was "exemplary." Pet. at 13a; *Sierra Club II*, 672 F.2d at 39. In finding that EDF's participation furthered the public interest, the court clearly did not abuse the discretion conferred upon it by Congress.

D. Guidance to EPA and the Executive Branch With Respect to Informal Rulemaking Procedures.

The court of appeals found that the prompt resolution of the issues raised by EDF and the Sierra Club "will contribute both to the Agency's future efforts to implement the Clean Air Act and to Congress's ongoing review of the Act." Pet. at 16a; 672 F.2d at 40. The Court also observed:

> "We note too that EDF's procedural challenges not only clarified how the new section 307(d) would

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Emmons, 33 N.Y.S.2d 688, 263 App. Div. 542 (App. Div. 1942); *Luttgen* v. *Tiffany*, 27 R.I. 416, 93 A. 182 (1915); *Evans* v. *Adams*, 180 S.C. 214, 185 S.E. 57, 61 (1936). *See generally*, Comment, *Court Awarded Attorneys' Fees and Equal Access to the Courts*, 122 U. Pa. L. Rev. 636, 675 & n.234 (1974).

> operate, but apparently provided fuel for discussion about appropriate restrictions on *ex parte* comments in other administrative proceedings. *See* Stockman Memorandum for Heads of Executive Departments and Agencies 2 (June 13, 1981)."
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> Pet. at 18a; 672 F.2d at 41.

As previously discussed, the court of appeals' decision in this case addressed several novel questions concerning informal rulemaking procedures which were not addressed by EPA regulations or by section 307 itself. As one commentator observed:

> "[T]he court elaborated at great length on the often puzzling requirements of section 307 of the Clean Air Act, with the result that those involved in Clean Air Act rulemakings have some guidance on what is expected of them and Congress has some indication of gaps in the existing provision that required the Court virtually to speculate about Congressional intent."
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> *D.C. Circuit Upholds NSPS*, 11 Envtl. L. Rep. 10218, 10222 (1981).

A prominent indication of the importance to the executive branch of the decision on the merits in this case is the "Stockman Memorandum," to which the court referred specifically. J. App. 30-31. The Memorandum was plainly influenced by the decision in this case. Although Executive Order 12291 does not address the issue raised in this case, the Memorandum attempts to ensure that agency rulemaking records will reflect information received from OMB under the Executive Order.[50] Moreover, the Memorandum points out that the procedures

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[50] One participant in the Symposium discussed at pp. 40-41 *supra*, is Counsel to the Vice President and the Task Force on Regulatory Relief, who described the Stockman Memorandum as the "guidelines" which "implemented" the Executive Order, Gray, *Presidential Involvement in Informal Rulemaking*, 56 Tul. L. Rev. 863, 874-75 (1982), although he notes that the views expressed are not necessarily those of the Task Force or the Vice President. *Id.* at 863 n.*.

adopted will be consistent with "the holding of and policies discussed in *Sierra Club* v. *Costle*. . . ." J. App. at 31. There is no citation of any other legal authority in the Memorandum. As a result, it seems clear that the decision in this case gave important guidance to the executive branch concerning proper informal rulemaking procedures. Certainly the court of appeals' finding that the litigation furthered the public interest in this respect was not arbitrary, fanciful or unreasonable. EPA has made no showing of an abuse of discretion.

III. IF THIS COURT FINDS THAT THE COURT OF APPEALS APPLIED AN INCORRECT LEGAL STANDARD, THE MATTER SHOULD BE REMANDED.

It is well established that an award of attorney fees is committed, within limits prescribed by Congress, to the discretion of the court in which the matter originated.[51] *Alyeska*, 421 U.S. 240 (1975). Such an exercise of discretion requires the court to base its decision on its familiarity with the conduct of the matter before it and with the record as a whole. If this Court rules that the court applied an incorrect standard, Sierra Club and EDF should have an opportunity to demonstrate their eligibility for a fee award under the proper one. If the standard adopted by this Court is to be interpreted in a manner similar to other fee award statutes, the decision to award fees will require consideration of more than the final judgment of the court. Among such factors could be a detailed assessment of the issues raised in this case, the degree to which each party was "successful" on each of those legal issues, and other respects in which the litigants have "successfully" served the public interest. In this case, the court of appeals performed a detailed review of the record, which the government has

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[51] The Solicitor General himself has acknowledged that § 307(f) "confers discretion on the courts of appeals to decide when attorneys' fee awards are 'appropriate.'" Reply Brief for Petitioner (filed in support of Petition for Certiorari), at 1.

conceded to be "an extended analysis."[52] If this Court now establishes a new interpretation of the statutory standard, the court of appeals should have the opportunity to apply that standard to the facts of this case.

CONCLUSION

For the reasons stated, the judgment of the court of appeals should be affirmed.

Respectfully submitted,

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[52] Brief for the Respondent in Opposition at 5, *Save the Valley, Inc.* v. *EPA*, *petition for cert. filed*, —— U.S.L.W. —— (U.S. Oct. 12, 1982) (No. 82-637).